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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

NO. 89-1905

WISCONSIN PUBLIC INTERVENOR, and
TOWN OF CASEY,

Petitioners,

v.

RALPH MORTIER and WISCONSIN FORESTRY/
RIGHTS-OF-WAY/TURF COALITION,

Respondents.

On Writ of Certiorari to the
Wisconsin Supreme Court

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTERESTS OF THE *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a non-profit, public interest law and policy center based in

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[1]Counsel for all parties have consented to the filing of all *amicus* briefs in this case. Their consents are on file with the Clerk of this Court.

Washington, D.C. with 120,0000 members nationwide. WLF is committed to advancing the free enterprise system and to promoting the principles of judicial restraint. To this end, WLF has appeared as *amicus curiae* before this Court as well as other state and federal courts in numerous cases affecting business. *See, e.g., Mobil Oil Exploration v. United Distribution*, 111 S.Ct. 615 (1991); *Pacific Mutual Life Insurance Cos. v. Haslip*, 59 U.S.L.W. 4157 (March 1, 1991); *Kansas and Missouri v. Utilicorp United Inc.*, 110 S.Ct. 2807 (1990); and *Ingersoll-Rand Company v. McClendon*, 111 S. Ct. 478 (1990).

In addition to its interests in issues affecting the free enterprise system, WLF devotes a substantial amount of time to issues relating to the proper interrelationship between the national and state governments. WLF believes that both the national and state governments have important roles to play in our federal system of government. WLF has appeared as *amicus curiae* before this Court on a number of occasions recently to urge that state and local governments be granted greater autonomy in their dealings with the national government. *See, e.g., Gregory v. Ashcroft*, No. 90-50 (decision pending 1991); *Howlett v. Rose*, 110 S. Ct. 2430 (1990); *Pennsylvania Department of Public Welfare v. Davenport*, 110 S. Ct. 2126 (1990); *United States v. Spallone*, 110 S. Ct. 625 (1990). In this case, however, WLF believes that a proper balancing between the powers of the federal government and local government requires that the decision below be affirmed.

Because of the unique perspective of WLF in its commitment to promoting a balance between state and federal rights and powers, this brief will bring relevant matter to the attention of the Court that may not be brought to the attention of the Court by other parties.

STATEMENT OF THE CASE

WLF is, in the interest of brevity, omitting any detailed statement of the facts of this case. WLF adopts by reference the statement of facts contained in Respondent's brief.

In brief, in 1972 Congress enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq.* That act provides a scheme of federal regulation of pesticides including the sale, use, storage, labelling, and export of pesticides. A portion of that statute provides that FIFRA is not intended to deprive a state of authority to regulate the sale or use of any federally registered pesticide in the state. 7 U.S.C. § 136v.

The town of Casey, Wisconsin enacted an ordinance which requires an individual to obtain a permit from the town prior to engaging in certain types of pesticide spraying. Mortier, a property owner in Casey, desired to spray a portion of his own land located in Casey with a pesticide. Mortier received a permit which precluded him from aerial spraying and limited the area in which he could spray. *Mortier v. Casey*, 452 N.W.2d 555, 556 (Wis. 1990).

Mortier joined with several organizations to challenge the Casey ordinance in court, arguing that the ordinance was preempted by FIFRA. The Circuit Court of Washburn County upheld the challenge. The Supreme Court of Wisconsin affirmed the decision of the Circuit Court, ruling that the Casey ordinance was preempted by FIFRA. *Id.* The Wisconsin Court found that while FIFRA "does not contain any express preemption language, it does, however, contain language which is indicative of congress' intent to deprive political subdivisions, like the

Town of Casey, of authority to regulate pesticides." *Id.* at 557. The court concluded that while the statutory language alone did not clearly manifest congressional intent to preempt local governments from regulating pesticide use, such an intent was manifested in the legislative history of FIFRA.

SUMMARY OF ARGUMENT

FIFRA preempts local regulation of pesticide use. FIFRA is a comprehensive federal regulatory statute that controls the manufacture, distribution, labelling and use of pesticides. Congress has carved out important areas in which the states are permitted to regulate pesticides -- including pesticide use. Congress has also carved out some limited areas for local regulation -- but regulation of pesticide use is not one of those areas. FIFRA's regulation of pesticide use is so comprehensive that, in the absence of the statutory provision explicitly permitting states to regulate pesticide use, FIFRA undoubtedly would be construed as preempting such regulation even by states.

Petitioners argue that since FIFRA permits the states to regulate pesticide use, FIFRA also permits political subdivisions of the states to regulate pesticide use. However, Congress defined in the statute what it meant by "states." Political subdivisions of states are not included in that definition. Furthermore, the ordinary meaning of the word "state" does not include political subdivisions of states. Finally, Congress did make reference to local governments in several provisions of FIFRA. If Congress had meant to include subdivisions of states within its understanding of the word states, there would not have been any reason for Congress to make separate references to states and local governments within the rest of FIFRA.

While FIFRA is unusual in that it permits states to regulate in an area comprehensively regulated by the national government, it is not unique. Several other federal statutes also involve comprehensive federal regulation while tolerating continued regulation by the states. Courts examining those statutes have not hesitated to find federal preemption of local government regulation despite the absence of any preemption of state regulation.

Finaily, the legislative history of FIFRA clearly demonstrates that FIFRA was intended to preempt local governments from regulating pesticide use. The Petitioners claim that the legislative history only demonstrates an "agreement to disagree" is premised upon the erroneous notion that the legislative defeats of the proponents of local regulation are meaningless. The legislative history indicates that both the proponents and opponents of local regulation believed that, as enacted, FIFRA preempted local governments from regulating pesticide use and that amendments to FIFRA would be necessary in order to change the preemptive force of FIFRA. The proponents of local regulation did propose such amendments, and those amendments were defeated.

ARGUMENT

I. THE STRUCTURE OF FIFRA DEMONSTRATES THAT LOCAL GOVERNMENTS ARE PREEMPTED FROM REGULATING THE USE OF PESTICIDES.

Local regulation of pesticides is preempted by FIFRA. The structure of FIFRA demonstrates that it is a comprehensive federal regulatory statute that has carved out important areas for state regulation but does not permit local governments to regulate pesticide use.

The Supremacy Clause of the United States Constitution, Article VI, Clause 2, makes the Constitution, laws adopted by Congress pursuant to the Constitution, and treaties "the supreme Law of the Land." The Supremacy Clause grants the national government the power to decide the extent to which federal law preempts state law, so long as that preemption does not interfere with states' rights under the Tenth Amendment to the Constitution.

Congress has the power, under the Supremacy Clause, to preempt not only state but also municipal authority in a particular field. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Furthermore, preemption analysis is the same for local ordinances as it is for statewide laws. *Hillsborough County, Fla. v. Automated Medical Laboratories*, 471 U.S. 707, 713 (1985).

The touchstone in deciding whether federal preemption has occurred is Congressional intent. *English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299 (1988); *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). Preemption is most clear when Congress explicitly prohibits state and local governments from enacting legislation in a given area. *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 482 (1990). Even in the absence of express statutory language, Congressional intent to preempt state and local laws can still be inferred from the presence of a pervasive scheme of regulation in a particular field. *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973).

When Congress amended FIFRA in 1972, a House committee reported to the full House of Representatives that the amended statute would "change FIFRA from a

labelling law into a *comprehensive* regulatory statute that will henceforth more carefully control the manufacture, distribution, and use of pesticides." H.R. Rep. No. 511, 92nd Cong., 1st Sess. at 1 (1971) (emphasis added). A number of courts that have examined FIFRA have concurred that the 1972 amendments transformed FIFRA into a comprehensive regulatory scheme. *Maryland Pest Control v. Montgomery County*, 646 F. Supp. 109, 110 (D. Md. 1986) *aff'd* 822 F.2d 55 (4th Cir. 1987); *National Agricultural Chemicals Association v. Lormanger*, 500 F. Supp. 456, 468 (E.D. Cal. 1980). The Wisconsin Supreme Court, while not basing it decision upon the pervasiveness of the federal regulation, also found that in amending FIFRA in 1972 Congress adopted a pervasive scheme regulating pesticide use. *Mortier v. Town of Casey*, 452 N.W.2d 555, 557 (Wis. 1990).

The structure of FIFRA, taken as a whole, demonstrates that Congress intended to permit the states and local governments to regulate pesticides only in certain areas where Congress explicitly permitted those governments to do so. In the absence of such explicit permission, FIFRA so occupies the field of pesticide regulation that all state and local regulations in that area would be preempted.

The pervasiveness of FIFRA's regulatory scheme is shown by the comprehensiveness of its reach. FIFRA requires registration of pesticides with the federal Administrator, 7 U.S.C. § 136a; requires the classification of pesticides by the federal Administrator, 7 U.S.C. § 136a(d); requires the certification of applicators of pesticides, 7 U.S.C. § 136b; requires registration of pesticide producers, 7 U.S.C. § 136e; requires inspection of establishments where pesticides are held for distribution or sale, 7 U.S.C. § 136g; makes certain uses of pesticides illegal, 7 U.S.C. § 136j; regulates the import and export

of pesticides, 7 U.S.C. § 136o; and regulates the disposal and transportation of pesticides, 7 U.S.C. § 136q.

The extensive federal regulation of the pesticide field clearly qualifies as a comprehensive scheme for purposes of preemption analysis. Furthermore, FIFRA provides for no state or local role in many aspects of the regulatory scheme. 7 U.S.C. §§ 136a, 136d, 136e, 136g, 136o, and 136q.

The total structure of FIFRA demonstrates that but for the carefully drawn exceptions drafted by Congress, the area of pesticide regulation would be totally preempted by the national government. In some areas Congress carved out important and extensive roles for state governments and very limited roles for local governments.

The roles of the states under FIFRA vary depending on the subject matter of the pesticide regulation. FIFRA grants the states some limited powers subordinate to the national government as part of the federal regulatory scheme. For example, the states may submit plans to the federal administrator for approval of a state plan to certify applicators of pesticides. 7 U.S.C. § 136b.

The potential for state governments to exercise more far-reaching powers under FIFRA is contained in a provision of FIFRA which authorizes (but does *not* require) the Administrator of FIFRA (head of the EPA) to enter into cooperative agreements with the states in the enforcement of the act and to assist State agencies in programs for the certification of applicators consistent with the standards the Administrator prescribes. 7 U.S.C. § 136n.

The final and most significant power the states have under FIFRA is contained in § 136v, "Authority of States." Part (a) of that section states:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this Act.

However, § 136v also contains limits on that authority of the states by prohibiting the states from imposing labeling and packaging requirements on pesticides.

In a very limited number of situations FIFRA recognizes a role for local governments. The Administrator is obligated to cooperate with other federal agencies, the states, and political subdivisions of states in carrying out the provisions of the act and in "securing *uniformity* of regulations." 7 U.S.C. § 136t(b) (emphasis added). The administrator may designate state or local governments to conduct record inspections of pesticide producers. 7 U.S.C. § 136f. Local governments along with the states also have one other minor role under FIFRA: the Administrator is to cooperate with state and local agencies in devising a national plan for monitoring pesticides. 7 U.S.C § 136r(b).

The role of states under FIFRA differs sharply from that of local governments. In drafting FIFRA, Congress carved out certain spheres of substantial power for the states in pesticide regulation.

The role of local governments in pesticide regulation, however, is extremely limited. Congress carved out only a few narrow areas in which it permitted local governments to participate in the federal scheme of pesti-

cide regulation. Regulating the *use* of pesticides is not one of those areas. The regulation of pesticide uses is reserved to the national government and state governments.

While it is true that FIFRA does not affirmatively state that local governments are prohibited from regulating pesticide use, that prohibition is clear by looking at the total structure of the statute. Had Congress not intended some preemption of local government pesticide regulation, it would not have found it necessary to explicitly permit local governments certain limited roles in other areas of pesticide regulation. Furthermore, if the regulation of pesticide use by local governments is not preempted by FIFRA, the grant of authority to the states to regulate pesticides would be meaningless. Congress explicitly granted to the Administrator and the states the power to regulate pesticide use; nowhere is that authority granted to local governments. Clearly, the doctrine of *expressio unius est exclusio alterius* (expression of one thing is the exclusion of another) applies in this case. Otherwise much of the statute is meaningless.

II. THE CONGRESSIONAL GRANT OF AUTHORITY TO THE STATES TO REGULATE PESTICIDE USE WAS NOT A GRANT OF SUCH AUTHORITY TO LOCAL GOVERNMENTS.

The Petitioners have equated the term "state" with the political subdivisions of a state, thereby hoping to avail themselves of FIFRA's accommodation of state regulation of pesticide use. Petitioners argue that when Congress permitted the states, pursuant to § 136v, to regulate the use of pesticides, it also granted such permission to local governments and other subdivisions of local governments. However, such a reading of the term "state" is inconsis-

tent both with the use of the word in the statute and with the plain and ordinary meaning of that word.

What Congress meant by the word "state" is no great mystery:

> **State**. -- The term "State" *means* a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa.

7 U.S.C. § 136(aa) (emphasis added).

This Court need go no further in attempting to find out what Congress meant by the term "state." Congress did not include political subdivisions of states within the definition of "state."

In discerning the intent of Congress, the words of a statute should be accorded their plain meaning. Congress is presumed to use words in their ordinary sense unless it expressly indicates the contrary. *Addison v. Holly Hill Fruit Products*, 322 U.S. 607 (1944). There is nothing that could be plainer than the meaning of the word "state," especially since Congress has itself defined the word.

The definition of "state" provided by Congress is consistent with the ordinary meaning of the term. "State" does not ordinarily include legislative subdivisions. *Local 1564 v. City of Clovis*, 735 F. Supp. 999, 1004 (D.N.M. 1990); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987); *Johnson v. Southern Ry. Co.*, 654 F. Supp. 121, 122 (W.D.N.C. 1987).

The intent of Congress in its use of the word "state" also is manifested by Congress's explicit references to local governments in three sections of FIFRA. If "states" were equated with local governments under FIFRA, then there would have been no reason for Congress ever to mention local governments.

III. OTHER STATUTES THAT PERMIT STATES TO ACT WITHIN A SCHEME OF FEDERAL REGULATION HAVE BEEN INTERPRETED TO PROHIBIT LOCAL REGULATION.

The tension between federal and state powers is a continuing one. However, as discussed above there is no question that short of a Tenth Amendment infringement, the federal government can preempt state and local government from enacting and enforcing legislation in any given area. FIFRA is in many ways an experiment in joint federal-state regulation. FIFRA is a fairly unusual statute in that it explicitly authorizes the states to regulate in a field that the federal government is regulating extensively. However, FIFRA is not unique. In several other areas of the law, courts have been faced with analogous preemption problems, and in those situations the courts have not hesitated to find that local governments are preempted from taking actions that states are permitted to take under the respective statutes.

One example of Congress granting powers to the states under a comprehensive regulatory scheme is the area of railroad safety. Congress in enacting railroad safety legislation authorized the states to accommodate local safety concerns by imposing regulations more stringent than the federal regulations, provided that the state regulations are not totally incompatible with federal regulations. Federal Railroad Safety Act, 45 U.S.C. § 434 (1986).

In interpreting the railroad safety statute, numerous courts have held that the statutory provision that permits state regulation does not permit regulation by local governments. *Chesapeake & Ohio Ry. Co. v. City of Bridgeman*, 669 F. Supp. 823 (W.D. Mich. 1987) ("since municipalities are not included in this preemption exception, municipalities are preempted from passing more stringent train speed limits"); *Johnson v. Southern Railway Co.*, 654 F. Supp. 121, 122-23 (W.D. N.C. 1987) ("[the act] says a *State* may adopt the law, rule, or regulation. It does not say the State may delegate to the cities and towns in the State the power to do so"); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1237 (N.D. Ind. 1987); *Sisk v. National Railroad Passenger Corp.*, 647 F. Supp. 861, 865 (D. Kan. 1986). An earlier version of that legislation was similarly interpreted by the courts to deny local governments the power to enact railroad safety ordinances. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir. 1973), *cert. denied*, 414 U.S. 855 (1973).

Another statute under which Congress has pervasively regulated an area of law, but still carved out a limited role for the states, is the National Labor Relations Act (NLRA), 29 U.S.C. §§ 141 *et seq*. The NLRA is a comprehensive statute regulating the conduct of labor relations for employers and employees engaged in interstate commerce. However, Section 14(b) of that act (29 U.S.C. § 164(b)) permits the states to prohibit union security agreements by enacting right-to-work laws.

In at least four states where there were no right-to-work laws, local governments enacted ordinances to attempt to prohibit union security agreements. Faced with challenges to those ordinances, three courts found that the grant of power to the states to enact "right-to-work" laws does not permit local governments to enact right-to-work

ordinances. *Local 1564 v. City of Clovis, N.M.*, 735 F. Supp. 999 (D.N.M. 1990); *Kentucky State AFL-CIO v. Puckett*, 391 S.W.2d 360 (Ky. App. 1965); *Grimes & Hauer, Inc. v. Pollock*, 163 Ohio 372, 127 N.E.2d 203 (1955); *but see, Chavez v. Sargent*, 329 P.2d 579 (Cal. App. 1958) (holding that local right-to-work ordinance was not preempted by federal law but was preempted by state law).

Finally, at least one federal court has interpreted the regulations implementing the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §§ 1671 *et seq.*, as prohibiting local governments from taking actions that Congress authorized states to perform. The implementing regulations of that act, 19 C.F.R. § 1970, authorized:

> (a) any state agency of any state having authority under the laws of that state to exercise safety jurisdiction over interstate transmission facilities....

A gas pipeline company challenged a Louisiana parish which attempted to impose safety regulations on the construction of a pipeline. The court held that the parish could not exercise that authority but must "seek the remedy to the ills about which they complain through an appropriate state agency to insure compliance with all federal laws and regulations." *United Gas Pipeline Co. v. Terrebonne Parish Police Jury*, 319 F. Supp. 1138 (E.D. La. 1970), *aff'd*, 445 F.2d 307 (5th Cir. 1971).

These federal court decisions provide models of how creative federalism can accommodate the exercise of regulatory powers by state governments without causing regulatory chaos that would occur if local governments were also permitted to regulate areas already subject to a comprehensive scheme of federal regulation. That model

of creative federalism has worked well in the above areas and is appropriate for the regulation of pesticides.

IV. THE LEGISLATIVE HISTORY OF FIFRA INDICATES THAT CONGRESS INTENDED TO PREEMPT LOCAL REGULATION OF PESTICIDE USE.

The legislative history of FIFRA provides further evidence that Congress intended to preempt local governments from regulating pesticide use. It is clear from the legislative history of FIFRA that Congress believed that it was excluding local governments from having a role in the regulation of pesticide use.

The House Committee on Agriculture was the first Congressional committee to report FIFRA to the full House. That Committee *rejected* an amendment that would have permitted local governments to regulate pesticides. H.R. Rep. No. 511, 92nd Cong., 1st Sess., p. 16.

In the Senate, the Senate Committee on Agriculture and Forestry concurred with the decision of the House Committee to deprive local governments of the authority to regulate pesticide use. S. Rep. No. 92-838, 92nd Cong., 2d Sess., *reprinted in* 1972 *U.S. Code Cong & Admin. News*, Vol. 3, pp. 3993, 4008. The Senate Commerce Committee then reported out a bill allowing local governmental regulation of pesticides. *Id.* at 4066. When the two Senate Committee met to iron out differences in the two Committee bills, the Commerce Committee was defeated in its attempt to permit local government regulation of pesticides. *Id.* at 4091. In a full vote of the Senate, the Senate defeated an amendment to permit local governments to regulate pesticides. 118 Cong. Rec. 32258 (1972).

It is clear from the legislative history that the proponents of local preemption were victorious. However, the Petitioners' reading of the legislative history of FIFRA is like an excerpt from Alice in Wonderland. The Petitioners attempt to turn legislative defeats into judicial victories. The Petitioners argue that "the preemption proponents failed to obtain from the full Congress an express provision or other amendatory language in FIFRA's preemption section to clearly limit or qualify the authority already possessed by municipalities to act in the field." Pet. Brief at 46-47. That interpretation of the legislative history of FIFRA is fundamentally flawed. Preemption opponents did *not* fail to obtain from the full Congress an express provision on local preemption. As is clear from the legislative history, the preemption proponents understood that FIFRA would preempt local regulation of pesticides. There is nothing to indicate that proponents believed that a provision expressly limiting local governments was necessary. The proponents did not believe that any express limitation was needed and hence took no action.

Perhaps more significantly, the *opponents* of local preemption apparently had the same understanding of FIFRA. If the opponents of local preemption thought that FIFRA permitted local regulation of pesticide use, they would not have had to do anything. But they did not view FIFRA as permitting local regulation; instead, on three occasions (in the Senate Commerce Committee, in the joint Senate Committee deliberations, and in the full Senate) opponents of local preemption attempted to amend FIFRA so as to permit local regulation.

The Solicitor General's *amicus curiae* brief supporting Petitioners also takes an Alice-in-Wonderland approach to legislative history. The Solicitor points out that the

Commerce Committee in its report noted that "although the Agriculture Committee bill does not specifically prohibit local governments from regulating pesticides, the report of that committee states explicitly that local governments cannot regulate pesticides in any manner." Solicitor's Brief at 18 citing S. Rep. No. 970, 92nd Cong., 2d Sess. 27 (1972). According to the Solicitor's brief the "Commerce Committee *therefore* proposed, among numerous other amendments, an amendment explicitly authorizing local regulation of pesticides." *Id.* (emphasis added). Apparently, even the Solicitor recognizes that the Commerce Committee believed that such explicit authorization of local regulations was necessary in order to overcome the preemption of local governments. However, the Commerce Committee amendment was *defeated*.

The Solicitor, faced with the apparently insurmountable problem of how to turn a legislative defeat into a legislative victory, argues that the legislative defeat of the Commerce Committee amendments makes "entirely plausible" the "agreement to disagree" interpretation of the legislative history of local preemption. Solicitor's Brief at 19-20.

The interpretation of legislative history espoused by the Wisconsin Supreme Court in *Mortier* and by the district court in *Maryland Pest Control Assoc. v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986), *aff'd*, 822 F.2d 55 (4th Cir. 1987), is consistent with the plain and ordinary meaning of the words of the text of the statute, is consistent with the entire structure of the statute, and recognizes that winners in legislative battles carry more weight than losers. When an amendment is defeated, it is not an "agreement to disagree" as characterized by Petitioners but is a defeat. This Court should not

assist the Petitioners in attempting to turn that defeat into a victory by permitting the local regulation of pesticides.

CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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